so, section 12 of the Interpretation and General Clauses Ordinance does not operate, and section 28(2) is a dead letter. Jurisdiction now depends on the Courts Ordinance alone. I hold accordingly that the introduction of assessors was unlawful. If it could be shown that they had in any way affected the course of the trial, that would probably render the whole proceedings unlawful; but it was one of Mr. Jag-Jit Singh's grounds of appeal that they had never been consulted, as they should have been. It certainly does not appear that their presence affected the trial in any way, and on this footing I am prepared to treat it as no more than an irregularity which might be disregarded.

Mr. Jag-Jit Singh first took the point that, since the girl in question had attained puberty, she was free from the *patria potestas* and had in law no "guardian". The offence charged could not therefore be committed. He relied on *Ghouse bin Haji Kadir Mustan v. Rex*[2]. As the girl lived with her father, who was her guardian if she had one, the offence of enticing her from her "father's" custody, as opposed to her guardian's, might have been charged. She was in his "keeping" within the meaning of the section even if she was no longer under *patria potestas* and he was not her guardian. I think, however, that the provisions of Enactment No. 62 (Majority) render *Ghouse's case* inapplicable in this State, at least in this particular connection. Although section 2 undoubtedly implies that a guardian has not, where a girl has attained puberty, certain of the rights which one would expect him to have, it does not destroy his right of custody or her person so long as she remains unmarried, and I think that under section 3 this right subsists until she is eighteen. I think this ground of appeal fails.

The next point taken was that certain evidence relating to sexual intercourse between the accused and the girl while she was with him should have been excluded. I do not agree. I think it was admissible to show motive, and possibly also as part of the general circumstances of the transaction. A much more serious objection is that, although the learned Magistrate admitted this evidence, he refused to allow it to be tested by cross-examination. As the complainant's evidence was in effect that she had been raped, great prejudice may have been caused. Medical evidence was available which strongly rebutted the allegation of rape and the learned Magistrate did not allow it to be given. Again, the learned Magistrate brushed aside cross-examination directed to show the falsity of the complainant's evidence that she had been locked up in a room in Penang for about forty-eight hours and could not escape or summon help. Part of it he allowed, but did not record, and part he disallowed altogether. The whole of this evidence was highly relevant on the question of the complainant's credit, which was violently attacked on grounds which appeared to me very substantial. I think that the learned Magistrate was wrong in law on these points and that his errors seriously prejudiced the accused.

The learned Magistrate accepted *in toto* the complainant's evidence. If he had not done so, I doubt if he would or should, have convicted on the remaining evidence. It could be severely criticized on many grounds. For all these reasons, I think the conviction cannot stand. The appeal is allowed and the conviction and sentence are set aside.

Appeal allowed.

REGINA v. OOI AH KOW.

[Rev. Crim. Juris. (Spenser Wilkinson, J.) April 3, 1952]

[Penang — Criminal Revision No. 4 of 1952]

Criminal Procedure Code (Cap. 21), ss. 416 and 417 — Whether bail can be granted where there are reasonable grounds for believing that the accused has been guilty of an offence punishable with death or penal servitude for life — Powers of the High Court — Courts Ordinance, s. 57.

The accused in this case was charged with attempted murder under section 307 of the Penal Code and with voluntarily causing hurt in the course of committing robbery or attempting to commit robbery under section 394 of the Penal Code. The Magistrate allowed the accused on bail. The question is whether the learned Magistrate was right in so allowing bail.

Held, (1) that the learned Magistrate had no power to release the accused on bail as there were reasonable grounds for believing that the accused had been guilty of an offence punishable with death or penal servitude for life; (2) that although under section 417 of the Criminal Procedure Code the High Court has an absolute discretion to grant bail in any case, it ought not to do so in cases punishable with death or in cases punishable with penal servitude for life except for exceptional and very special reasons.

Cases referred to:—

(1) *Re K. S. Menon* (1946) M.L.J. 49.

(2) *In re Lim Peng Koi* (1952) M.L.J. 26.

CRIMINAL REVISION.

C. M. Sheridan (D.P.P.) for the Crown.

C. D. D. Hogan for the accused.

Cur. Adv. Vult.

Spenser Wilkinson, J. : — The accused in this case is charged with attempted murder under section 307 of the Penal Code and with voluntarily causing hurt in the course of committing or attempting to commit robbery under section 394 of the Penal Code. The maximum penalty under each of these sections is penal servitude for life.

The incident out of which these charges arose took place on the 21st February, 1952; the accused was arrested on the 25th February, 1952, and on the 26th February was taken before a Magistrate. He was remanded in custody from time to time until on the 27th March, 1952 Counsel on his behalf applied for bail. The Magistrate on this application made an Order releasing the accused on bail in the sum of $35,000.

The allegations against the accused are that he was driving a car along the North Coast Road in the evening of the 21st February, 1952 with the complainant sitting on his left and two other persons sitting in the rear seat. The complainant had upon his person two cheques drawn by the accused of a total value of $9,000. The complainant's story is that at some point along the Coast Road the accused stopped the car; that one of the persons in the back of the car attempted to strangle him; that the accused said: "Get the cheques"; and that he, the complainant, remembered nothing more until he found himself early the next morning at the foot of a rocky bank partly immersed in the sea. It is stated that the complainant, who was taken to hospital, bears marks of attempted strangulation on his neck. The other two persons alleged to have been in the back of the car have not yet been arrested.

The question before me was whether the learned Magistrate had been right in allowing bail to the accused in these circumstances. This depends mainly on the construction of section 416 of the Criminal Procedure Code. Sub-section (1) of that section provides that when a person accused of a non-bailable offence is brought before the Court he may be released on bail but shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or penal servitude for life. There is a proviso to this sub-section which is not relevant to the present case. In the case of *Re K. S. Menon*[1] it was held that the expression "punishable with death or penal servitude for life" should be read disjunctively as though it read "with death or with penal servitude for life", and I respectfully agree with that decision. I think, therefore, that under sub-section (1) of section 416 the learned Magistrate had no power to release the accused on bail, because, unless there had been at least reasonable grounds of suspicion that the accused had been guilty of such offences he would presumably not have been remanded in custody on the previous occasions (see Explanation to section 232 of the Criminal Procedure Code).

Mr. Hogan, who argued the case before me on revision on behalf of the accused, stated that the application for bail was based on sub-section (2) of section 416. The relevant part of this sub-section reads as follows :—

> "If it appears to such.....Court at any stage of the.....inquiry or trial.....that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall.....be released on bail....."

I had some doubt as to whether sub-section (2) really applied to this case, because I thought the words "If it appears at any stage of the inquiry" suggested that the sub-section only came into effect when the inquiry had started and some evidence had been taken from which "it appeared" that the accused might not have committed a non-bailable offence. This point, however, was not taken and the matter was argued before me on the basis that sub-section (2) was applicable. It is unnecessary for me to decide this point because on the assumption that sub-section (2) applied I was still of opinion that the learned Magistrate ought not to have granted bail in this case.

In my opinion, under sub-section (2) of section 416, the only ground upon which a Magistrate can release on bail a person accused of a non-bailable offence is that at the stage the proceedings have then reached there have ceased to be reasonable grounds for believing that he has committed such an offence but that there are grounds for further inquiry. It was not suggested on behalf of the accused either before the Magistrate or before me that there were not reasonable grounds for believing that the accused had committed a non-bailable offence; and if such a suggestion had been made or the Magistrate himself felt doubts on the point the prosecution should have been given an opportunity of adducing some evidence to indicate that such reasonable grounds existed. I was, therefore, satisfied that the Order of the learned Magistrate granting bail was wrong and that it must be set aside.

Under section 417 of the Criminal Procedure Code there is no doubt that the High Court has an absolute discretion to grant bail in any case, and this matter being before me on review I thought it proper to consider whether this was a case in which the High Court ought to grant bail. Again, following the case of *Re K. S. Menon*[1], I was of opinion that in cases punishable with death and in cases punishable with penal servitude for life the High Court ought not to grant bail, except for exceptional and very special reasons. I could see no such exceptional or special reasons in the present case.

It was suggested on behalf of the defence that the accused was being and would be held in custody whilst the Police searched for the two missing men alleged to have been in the back of the car. The Deputy Public Prosecutor assured me that this was not so, and pointed out that a very large number of witnesses had already had statements taken from them, some as far away as Kuala Lumpur, and that further statements were still being taken and that any delay there might be in the investigation of the case was in no way concerned with the question of finding the other two men, and I accepted this assurance.

If by reason of delays in the investigation of the case by the Police inordinate delay is caused, then this might become an exceptional or special reason for the High Court to grant bail even in a serious case of this kind, but in my opinion there is no ground at the present stage for suggesting that there has been or will be undue delay.

I observe that in the recent case of *In re Lim Peng Koi*[2], the report of which had not been received when the argument in the present case took place before me, bail was granted by a Magistrate in Singapore in a case of gang robbery. It does not appear from the report, however, in what circumstances bail was granted; nor is it clear to what extent the point was raised at the hearing of the application for *habeas corpus* that bail ought not to have been granted. The learned Judge in his judgment says: "The Magistrate after hearing all parties thought fit to allow bail in $10,000 and I should not feel disposed to alter his decision in that regard, even if I had power to do so". There may have been grounds in that case for doubt as to whether the accused had committed the offence charged and in such circumstances the High Court would, of course, not lightly interfere with the exercise of discretion by the Magistrate. As to this Court having power to alter a Magistrate's decision as to bail, although the High Court in Singapore has the same powers of revision under section 322 of the Criminal Procedure Code as this Court has, it has not, as far as I am aware, the wide powers conferred upon the High Court of the Federation by section 57 of the Courts Ordinance, 1948. I have no doubt that I have power to alter the Magistrate's decision as to bail where the decision is not based upon a correct exercise of discretion, and I do not think the Singapore decision is an authority in any way contrary to the views I have formed in the present case.

For the above reasons I set aside the Magistrate's Order releasing the accused on bail and substituted therefor an Order remanding the accused in custody for one week from 27th March, 1952.

Order accordingly.

V. KANDIAH v. THE GOVERNMENT OF THE FEDERATION OF MALAYA.

[Orig. Civ. Juris. (Wilson, J.) April 24, 1952]

[K.L. — Civil Suit No. 216 of 1951]

Damages — Claim for wages and damages for wrongful dismissal — Frustration of contract.

The plaintiff was a postal clerk in the Postal Department of the Government of the Federated Malay States. On the occupation of Malaya by Japanese Forces he joined the Postal Department administered by the Japanese. Subsequently he went to India as a member and volunteer in the Indian National Army. After the Liberation of Malaya he applied to the British Military Administration for reinstatement in the Postal Department. After considerable delay he was informed that he was dismissed from the service and would not be reinstated.

Held, his contract of service with the Government of the Federated Malay States was terminated by reason of frustration by reason of the occupation of Malaya by the Japanese Forces.

Cases referred to :—

(1) *Unger v. Preston Corporation* (1942) 1 All E.R. 200.

(2) *Constantine (Joseph) Steamship Line, Ltd. v. Imperial Smelting Corpn., Ltd., The Kingswood* (1941) 2 All E.R. 165.

(3) *Nordman v. Rayner & Sturges* (1916) 33 T.L.R. 87.

(4) *Marshall v. Glanvill* (1917) 2 K.B. 87.

CLAIM FOR DAMAGES.

K. L. Devaser for the plaintiff.

D. M. K. Grant (Federal Counsel) for the defendants.